Supreme Court, U.S.
FILED

961373 FEB 25 1997

OFFICE OF THE CLERK

No. 96-

==========

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

THONGCHAI SANGUANDIKUL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

==========

PETITION FOR WRIT OF CERTIORARI

==========

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
Attorney for Petitioner

February 1997

38 pp

QUESTIONS PRESENTED

1. Should a court of the United States dismiss the federal criminal prosecution of a defendant whose extradition from abroad, pursuant to a treaty, was procured by the presentation of material false evidence to the foreign tribunal by federal agents?

2. Does evidence that a juror in a federal criminal trial expressed an opinion of the defendant's guilt prior to hearing any evidence create a presumption of prejudice requiring a new trial unless rebutted by the government?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Sanguandikul and the United States). None of petitioner's co-defendants on this indictment were apprehended. He stood trial and appealed alone. Petitioner knows of no related cases pending.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF ALL PARTIES ii
INDEX TO APPENDIX iv
TABLE OF AUTHORITIES iv

PETITION
OPINIONS BELOW 1
JURISDICTION 2
TEXT OF TREATY PROVISIONS INVOLVED . . 2
STATEMENT OF THE CASE 4
a. Procedural History 4
Jurisdiction of court below . . 6
b. Statement of Facts 6

REASONS FOR GRANTING THE WRIT

1. The decision below improperly extended this Court's holdings in Ker and Alvarez-Machain in refusing to dismiss the prosecution of a person subjected to an international extradition procured by the intentional or reckless presentation of materially false evidence by United States agents to the foreign tribunal 8

2. The circuits are in conflict on the question whether evidence that a juror held a preconceived opinion of the defendant's guilt prior to hearing the evidence creates a presumption of prejudice ordinarily requiring a new trial. 18

CONCLUSION 21

INDEX TO APPENDIX

A. Judgment Order of the Court of Appeals A1-A2

B. District Court Opinion B1-B9

TABLE OF AUTHORITIES

Cases:

Davies v. Director of Pub. Prosecutions,
1 All E.R. 507, 513 (1954) 9-10

Demjanjuk v. Petrovsky,
10 F.3d 338 (6th Cir. 1993) 17

Fernandez v. Phillips,
268 U.S. 311 (1925) 16

Ker v. Illinois,
119 U.S. 436 (1886) 16-18

McDonald v. Pless & Winbourne,
238 U.S. 264 (1915) 20

Tanner v. United States,
483 U.S. 107 (1987) 20-21

United States v. Alvarez-Machain,
504 U.S. 655 (1992) 8, 16, 17-18

United States v. Bertoli,
40 F.3d 1384 (3d Cir. 1994) 19

United States v. Dean, 647 F.2d 770
(8th Cir. 1991), rev'd, 667 F.2d 729
(in banc), cert. denied, 456 U.S.
1006 (1982)..... 19-20

United States v. Hill,
976 F.2d 132 (3d Cir. 1992) 4

United States v. Marrero,
904 F.2d 251 (5th Cir. 1990) 20

United States v. Rauscher,
119 U.S. 407 (1886) 16

United States v. Resko,
3 F.3d 684 (3d Cir. 1993) 19

Statutes, Treaty and Rules:

18 U.S.C. § 3231 6
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 6
Interstate Agreement on Detainers,
18 U.S.C. appx. 2 17
Supplementary Treaty Concerning the
Extradition Treaty Between the
United States and the United Kingdom
of Great Britain and Northern Ireland
(entered into force Dec. 23, 1986),
amending 28 U.S.T. 227 (entered into
force Jan. 21, 1977) 9, 16
Fed.R.Crim.P. 4(b) 6
Fed.R.Evid. 606(b) 20, 21
S.Ct. Rule 13.1 2
S.Ct. Rule 14.1(g)(ii) 6

Miscellaneous:

U.S. Dept. of Justice Man. 9-368
(P-H ed. 1989) 9

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THONGCHAI SANGUANDIKUL respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 27, 1996, affirming his conviction for conspiring to import heroin into the United States.

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Third Circuit (Becker, McKee and Garth, JJ.), affirming the petitioner's conviction and sentence in the United States District Court for the Middle District of Pennsylvania, was filed on November 27, 1996, but the court filed no opinion. The judgment order is noted at 103 F.3d 114; a copy is Appendix A to this petition. The district court's opinion is unpublished. Appx. B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 27, 1996. This petition is filed on or before the ninetieth day thereafter. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF TREATY PROVISIONS INVOLVED

The Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, 28 U.S.T. 227 (signed June 8, 1972; entered into force Jan. 21, 1977), provides, in pertinent part:

> Article III
>
> (1) Extradition shall be granted for an act or omission the facts of which disclose an offense within any of the descriptions listed in the Schedule annexed to this Treaty ....
>
> (2) Extradition shall also be granted for any ... conspiracy to commit an offense within paragraph (1) of this Article ....
>
> **SCHEDULE**
>
> **List of offenses referred to in Article III**
>
> * * * *
>
> 12. An offense against the law relating to narcotic drugs ....;

The Supplementary Treaty Concerning the above treaty (entered into force Dec. 23, 1986), provides, in pertinent part:

Article 2

Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party.

* * * *

Article 6

This Supplementary Treaty shall form an integral part of the Extradition Treaty and shall apply:

(a) ... to ... the territories for whose international relations the United Kingdom is responsible which are listed in the Annex to this Supplementary Treaty; ....

ANNEX

... Hong Kong ....

STATEMENT OF THE CASE

The petitioner, Thongchai Sanguandikul, a Thai citizen residing in Bangkok, was extradited from Hong Kong to stand trial in Scranton, Pennsylvania, for conspiracy to import heroin. The defense contended that petitioner was innocent of the charge and had been misidentified, perhaps as one of his fugitive, co-defendant brothers.

A. Procedural History

A federal grand jury sitting in the Middle District of Pennsylvania returned a sealed, one-count indictment on January 16, 1990, charging the petitioner, his two brothers Chowalit and Somchai, and three other individuals, all of them Asians, with conspiring between April 1987 and June 1989 with Americans Raphael Santana and Albert Castagnola to import heroin into the United States from Thailand through Mexico.

Santana stood trial previously on a related indictment and was sentenced to life imprisonment.[1] Castagnola pleaded

---

[1] Santana apparently did not appeal. In a separate trial on another, related Middle District indictment for conspiracy with Santana to distribute heroin and to launder money, Robert F. Hill was also convicted. See United States v. Hill, 976 F.2d 132 (3d Cir. 1992). Another

guilty and cooperated with the prosecution; he was sentenced to five years. Petitioner was arrested and detained by Hong Kong authorities on November 3, 1991, and extradited to the United States in September 1993 after exhausting a series of appeals. Petitioner's brothers have not been arrested; all other co-defendants are either fugitives or are awaiting extradition. Petitioner pleaded Not Guilty and stood trial alone.

An eight-day trial was held in May 1995, before U.S. District Judge Edwin M. Kosik and a jury. The jury deliberated over two days, and did not return its verdict until it had been sent back twice for further deliberations after reporting an inability to agree.

Ultimately, petitioner was convicted on the single conspiracy count charged. By post-verdict Motion to Vacate, petitioner forwarded to the court letters that defense counsel had received from two jurors reporting that two other jurors held predetermined opinions of petitioner's guilt before any witnesses were called. By opinion filed December 28, 1995, the district court denied this motion without a hearing. Appx. B.

On April 30, 1996, Judge Kosik sentenced petitioner to serve 188 months' (over 15½ years') imprisonment, followed

---

(cont'd)

related trial was subsequently held in the Southern District of New York.

by five years' supervised release, and to pay a $50 special assessment. Judgment was filed and entered May 3, 1996. Notice of appeal was filed on April 30, 1996, following sentencing, and became effective upon entry of the judgment.

On direct appeal, the United States Court of Appeals for the Third Circuit affirmed by judgment order. Appx. A.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The district court's subject matter jurisdiction was invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of a federal criminal offense. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed after sentencing and before entry of the judgment of sentence. Fed.R.Crim.P. 4(b).

B. Statement of Facts

Prosecution witnesses at trial described a conspiracy, led by Raphael Santana, to import large quantities of heroin from Thailand into the United States, via Mexico. The heroin was to be smuggled into Arizona, driven to north central Pennsylvania, where Santana resided, and ultimately distributed in New York.

Cooperating witness Castagnola, whose credibility was heavily impeached, testified that when Santana sent him to

Thailand in 1988 to meet with petitioner's brothers and arrange the purchase of heroin, petitioner participated in the discussions and was the one to inform him how the heroin would be packaged for shipment to Mexico. In 1989, Castagnola transported $1.7 million to Texas, where it was taken into Mexico and wired to accounts said to be controlled by petitioner in Thailand as a down payment for the shipment of 70 kilograms of heroin.

In May 1989, Thai police cooperating with the U.S. DEA in Bangkok seized 45 kilograms of heroin in containers destined for Mexico, as requested by Santana. Castagnola testified that petitioner told him of this seizure and sent him a newspaper clipping to confirm it. When Santana was arrested in June 1989 in Florida, a search of his home turned up the clipping concerning the Bangkok seizure.

REASONS FOR GRANTING THE WRIT

1. The decision below improperly extended this Court's holdings in Ker and Alvarez-Machain in refusing to dismiss the prosecution of a person subjected to an international extradition procured by the intentional or reckless presentation of materially false evidence by United States agents to the foreign tribunal.

The Court should grant a writ of certiorari in this case to address an important question which arises in the wake of United States v. Alvarez-Machain, 504 U.S. 655 (1992), concerning the due process rights of foreign nationals extradited to face trial under a federal criminal indictment: When material misstatements by U.S. law enforcement officials create a fraud on the foreign extraditing tribunal, should the federal court dismiss the indictment as a sanction, permitting the defendant to be repatriated? The court below wrongly answered this question in the negative.

Petitioner was extradited to the United States on the basis of a "package" assembled by U.S. prosecutors and presented by Crown Counsel before a Magistrate in Hong Kong. Extradition to the United States from Hong Kong was at that time (and for several more months still is) governed by a treaty between the United States and the United Kingdom.

Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Signed at London on 8 June 1972 (entered into force Dec. 23, 1986), amending 28 U.S.T. 227 (entered into force Jan. 21, 1977) ("U.S.-U.K. Treaty"). See id., art. 6(a) & Annex (set out above).

The key evidence presented to the magistrate in Hong Kong to justify petitioner's extradition was an affidavit of the accomplice witness Castagnola, CA3 App. A11-A21, whose uncorroborated testimony would be insufficient to permit extradition under the treaty, by virtue of its reference to local law. See U.S.-U.K. Treaty, art. 2.[2] Accordingly, the

---

[2] "The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested party." Id. "In the United Kingdom, Canada, and other common law countries, the documents in support of an extradition must establish a prima facie case. A prima facie case is established when the evidence submitted to a foreign magistrate would, if standing alone, justify a properly instructed jury in returning a verdict of guilty." U.S. Dept. of Justice Man. 9-368 (P-H ed. 1989). Under the criminal law of Great

package also contained an affidavit of DEA special agent Dennis Malloy, since retired, sworn to before a U.S. Magistrate Judge on November 22, 1991, and presenting what corroboration the government claimed to have of Castagna's assertions of petitioner's involvement in the conspiracy. This affidavit asserted as a fact that petitioner used the telephone on April 22 and April 24, 1988, to arrange a heroin transaction with Raphael Santana:

> 7. On April 22, 1988, Raphael Santana spoke by telephone to THONGCHAI SANGUANDIKUL in Bangkok, Thailand. This telephone conversation was intercepted pursuant to a court-authorized wiretap. During the course of the conversation, THONGCHAI SANGUANDIKUL told Santana that the "10" that Santana was asking about had been promised to someone in Europe. THONGCHAI SANGUANDIKUL also informed Santana that if the "door opens up" everything will be fine. Based on your affiant's experience, it is believed that

_____(cont'd)

Britain, a conviction may not be based solely upon the uncorroborated testimony of an accomplice. See, e.g., Davies v. Director of Pub. Prosecutions, 1 All E.R. 507, 513 (1954).

THONGCHAI SANGUANDIKUL was telling Raphael Santana that 10 kilos or 10 units of heroin that Raphael Santana had been waiting for had been promised or delivered to another customer in Europe. It is further believed that THONGCHAI SANGUANDIKUL in this conversation promised to delver heroin to Raphael Santana if suitable arrangements could be made.

8. On April 24, 1988, a telephone conversation between Raphael Santana and THONGCHAI SANGUANDIKUL was intercepted pursuant to a court-authorized wiretap. During the course of that conversation, Santana referred to THONGCHAI SANGUANDIKUL as "Chai". Santana told THONGCHAI SANGUANDIKUL that there was no rush, and that THONGCHAI SANGUANDIKUL was to send the bill "for the delivery". It is your affiant's belief based on my experience as Drug Enforcement Administration Agent that the conversation between Raphael Santana and THONGCHAI SANGUANDIKUL referred to THONGCHAI SANGUANDIKUL forwarding a bill to Santana or an individual referred to as "Chapo" in Mexico for

payment for the previously-referred to shipment of heroin. Reference is made by Raphael Santana in this conversation to "flowers". Based on my personal experience as well as the information provided to me by co-conspirator Albert Castagnola, it is my belief that the term "flowers" refers to heroin.

CA3 App. A25-A26.

About three months later, on February 26, 1992, the Department of State submitted a supplemental package to the Crown in Hong Kong for use in the extradition proceedings. This second package contained four items, three of them designated as "supplemental affidavits" of three persons whose affidavits had been part of the original package. One of those was Agent Malloy. In particular, the amended affidavit of Agent Malloy stated:

> 5. Surveillance and a Court-authorized wiretap determined that Raphael Santana telephoned the aforementioned number [in Bangkok] on April 22, 1988 and April 24, 1988. During these telephone calls, Santana did in fact talk to an individual believed to be THONGCHAI SANGUAN-DIKUL a/k/a THONGCHAI SANGVAN-DIKUL a/k/a CHAI or his brother Somchai Sanguandikul. Santana

and this individual had coded conversations concerning the shipment of drugs and payment for drugs. This is based on my experience with the Drug Enforcement Administration. ...

* * * *

7. On April 22, 1988, Raphael Santana spoke by telephone to an individual believed to be either THONGCHAI SANGUANDIKUL or his younger brother Somchai Sanguandikul. Exhibit 1 is a transcript of this conversation. This telephone conversation was intercepted pursuant to a court-authorized wiretap. During the course of the conversation, the individual believed to be either THONGCHAI SANGUANDIKUL or Somchai Sanguandikul told Santana that the "10" that Santana was asking about had been promised to someone in Europe. The individual believed to be either THONGCHAI SANGUANDIKUL or Somchai Sanguandikul also informed Santana that if the "door opens up" everything will be fine. Based on your affiant's experience, it is believed that this individual was telling Raphael Santana that 10 kilos or 10 units of heroin that Raphael Santana had been waiting for had been

> promised or delivered to another customer in Europe. It is further believed that this individual in this conversation promised to deliver heroin to Raphael Santana if suitable arrangements could be made.

CA3 App. A39-41. The record does not reveal any mention in this packet that any of these materials were being submitted for the purpose of correcting misstatements in the original package, nor any memorandum calling the reader's attention to any discrepancies between the original affidavits and those now being provided, nor any explanation for the previous sworn statements' having been inaccurate.

Agent Malloy's "supplemental affidavit" demonstrates that his initial affidavit, although purportedly sworn to on personal knowledge, was actually -- at best -- a statement of speculative belief that had no factual basis. Although the literal effect of the "supplemental affidavit" was to eliminate all averments relating to the April 22 and 24 telephone calls that were incriminating to petitioner, the paragraphs were not deleted, much less retracted. Instead, they were re-written as exercises in innuendo and unattributed hearsay and opinion, necessarily known to be inadmissible in the extradition proceedings, yet continuing to feature petitioner's name, repeatedly, in prominent typography.

The misrepresentations and misleading correction concerning the taped telephone calls did not stand alone. As noted above, petitioner had been arrested November 3, 1991, in Hong Kong. On November 13, 1991, Senior Crown Counsel McNair wrote to petitioner's newly-retained defense counsel, responding to a letter requesting particulars of the case. In that letter, McNair stated that among the "facts [that] were put before the learned Magistrate to oppose bail" after petitioner's arrest was: "(3) The Royal Thai Police in conjunction with the U.S.D.E.A. have had Thongchai [sic] under surveillance for 2 years, and have extensive video footage of him going in and out of the premises where the 45 kgs. heroin was stored and seized, footage of him talking with various co-conspirators." CA3 App. A82. As later revealed at trial, however, in the testimony of Hong Kong police investigator (and qualified barrister) Philip Wallace, a witness for the government, attorney McNair "made that representation as a result of communications that he had with the U.S. authorities." CA3 App. A771. Yet in fact, no such video footage ever existed; Wallace had never seen it, id., and none was either referred to or used at trial.

The presentation of false information to the Hong Kong extradition tribunal was necessarily either reckless

or intentional. The misleading and evasive phrasing of the "supplemental" Malloy affidavit speaks for itself. Since it is inconceivable that false and misleading statements could constitute, under the law of the United Kingdom, "evidence of criminality" that "would justify committal for trial" on a charge of conspiracy to import heroin, U.S.-U.K. Treaty, art. 2,[3] it follows that petitioner was extradited from Hong Kong, at the behest of United States authorities, in violation of the treaty.

This Court should grant certiorari to discuss whether these circumstances, once revealed to the federal court, call for dismissal of the prosecution and vacatur of the extradition. Contrary to the view of the lower court, this is not a case like Ker v. Illinois, 119 U.S. 436 (1886), and United States v. Alvarez-Machain, 504 U.S. 655 (1992), but rather like United States v. Rauscher, 119 U.S. 407 (1886).

The Rauscher case, decided the same day as Ker v. Illinois, supra, in an

---

[3] This specific standard set forth in the pertinent treaty supersedes the general rule, established by this Court, that international extradition should be sustained when "there was any evidence warranting the finding that there was a reasonable ground to believe the accused guilty." Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

opinion by the same Member of the Court, established the terms of an international treaty (there, the Rule of Speciality) as an exception to Ker's doctrine that a court may exercise personal jurisdiction in a criminal case even though the defendant had been kidnapped or otherwise unlawfully brought in to answer the charges.[4] In Alvarez-Machain, this Court recently reaffirmed the Ker doctrine, emphasizing there, as it had a century earlier, that the illegal removal of the defendant to the United States had not occurred pursuant to any extradition treaty and that no violation of any treaty had been shown. Here, the situation is just the opposite.

That the extradition order was upheld on appeal within the United Kingdom, see CA3 Gov't Supp. Appx., cannot be determinative. It is the responsibility of the United States courts to set and enforce the standards of professional conduct for federal prosecutors and agents, and the consequences that will apply when a fraud on the court is perpetrated, as it was here on the court in Hong Kong. See Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993) (extradition vacated based on improper

---

[4] The same is true of interstate extradition by virtue of the Interstate Agreement on Detainers, article V(d), 18 U.S.C. appx. 2.

withholding of exculpatory material by U.S. prosecutors, after petitioner's extradition to Israel which resulted in erroneous conviction and death sentence -- eventually overturned when Israeli prosecutors discovered and disclosed the exculpatory evidence).

In the instant case, where the federal agents' intentional or reckless perpetration of a fraud on the Hong Kong court violated the terms of the applicable treaty, a remedy can be afforded notwithstanding the Ker-Alvarez doctrine. The Court should grant certiorari to demonstrate that the integrity of the United States as it relates both to criminal justice and to international relations demands a high standard of conduct by federal agents in the presentation of evidence to foreign tribunals considering requests for extradition to this country.

2. The circuits are in conflict on the question whether evidence that a juror held a preconceived opinion of the defendant's guilt prior to hearing the evidence creates a presumption of prejudice ordinarily requiring a new trial.

The Court should also grant certiorari in this case because the Third Circuit's judgment below perpetuates a circuit conflict concerning the handling

of post-verdict evidence of prejudiced jurors. In this case, in letters sent to defense counsel about three months after the verdict (but before petitioner had been sentenced) two jurors told of remarks by two other jurors indicating a preconceived opinion of petitioner's guilt before having heard any evidence. The resulting motion to vacate the conviction was refused.

The Third Circuit holds that improper "extra-jury influences are far more serious than intra-jury influences," such as premature deliberations or the forming of preconceived opinions. United States v. Bertoli, 40 F.3d 1384, 1394 (3d Cir. 1994). Therefore:

> certain extra-jury influences create a presumption of prejudice that must be rebutted by the government for the court to uphold the conviction. ... But cases involving impermissible intra-jury contacts do not create such a presumption.

Id., citing United States v. Resko, 3 F.3d 684, 690 (3d Cir. 1993). The trial court followed these opinions in denying petitioner a new trial, Appx. B, and the court of appeals affirmed. Appx. A.

The Eighth Circuit, by contrast, ruled in United States v. Dean, 647 F.2d 770, 782-85 (1991), that an actual expression of bias by a juror prior to deliberations required an order for new

trial.[5] The panel distinguished the many cases in which prejudice could not properly be presumed, such as exposure to publicity or premature deliberations, from those few cases, such as Dean and the instant case, in which a juror's actual expression of a pre-conceived opinion is shown. See also United States v. Marrero, 904 F.2d 251, 261-62 (5th Cir. 1990) (trial court held inquiry and discredited testimony that one juror had stated prematurely that defendant was guilty).

Having correctly noted that the bar of Fed.R.Evid. 606(b) does not apply to assertions of bias outside of the jury's deliberations, Appx. B2, the trial court mistakenly relied on the policies discussed in this Court's decisions in Tanner v. United States, 483 U.S. 107 (1987), and McDonald v. Pless & Winbourne, 238 U.S. 264 (1915), to justify its refusal even to hold a hearing to confirm the facts of the matter. The question here was not how the jury reached its verdict in deliberations, but whether two

---

[5] The panel reached this conclusion even though defense counsel knew of the problem prior to the delivery of the verdict yet did not bring it up until after. On this latter point of waiver by delay, the en banc court disagreed with the panel and therefore reinstated the trial court's order denying a new trial. 667 F.2d 729, cert. denied, 456 U.S. 1006 (1982).

of the jurors falsely avowed open minds at the beginning of the trial, given their admissions to fellow jurors that their minds were already made up to convict before hearing any evidence.

The policies enforced by Rule 606(b), as explained in Tanner concern "insulating the jury's deliberative process." 483 U.S. at 120. It would not impinge upon the privacy or secrecy of the jury's deliberations to determine with certainty whether two jurors began the trial with a preconceived opinion of guilt. The trial court should either have invoked the presumption of prejudice or have convened a hearing, as would have occurred in the Eighth Circuit.

For this reason as well, a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner THONGCHAI SANGUANDIKUL prays that this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand to the United States District Court with instructions to dismiss the case.

Respectfully submitted,

By: PETER GOLDBERGER
Attorney for Petitioner

February 24, 1997.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7279

UNITED STATES OF AMERICA
v.
THONGCHAI SANGUANDIKUL,
Appellant

Appeal from the
United States District Court for the
Middle District of Pennsylvania
D.C. Criminal No. 90-cr-00011-3
(District Judge:
Honorable Edwin M. Kosik)

Argued: November 7, 1996

Before: BECKER, McKEE, and GARTH,
Circuit Judges

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

1. That the indictment should be dismissed because the United States [e]xtradited appellant by submitting materially false information to the Hong Kong authorities;

2. That appellant's right to a fair trial was denied when the government introduced irrelevant and prejudicial evidence regarding the appellant's alleged illegal arms sale;

3. That the appellant's constitutional and statutory rights rights were

violated by the government's deliberate failure to turn over Jencks and Brady material; and

4. That the trial court violated the appellant's right to a fair trial when it failed to conduct a hearing into the fact some jurors harbored an actual bias against him; it is

ADJUDGED AND ORDERED that the judgment of the district court of May 3, 1996 be and is hereby affirmed.

BY THE COURT:

s/Edward R. Becker
Circuit Judge

Attest:
s/P. Douglas Sisk
P. Douglas Sisk, Clerk
NOV 27 1996

APPENDIX B

FILED
DEC 28 1995
s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.
vs.	:	90-011
THONGCHAI SANGUANDIKUL	:	(Judge Kosik)

MEMORANDUM AND ORDER

This matter is before the court on the motion of the defendant to vacate his conviction and grant a new trial on the grounds that the jury verdict was infirm as a result of the jury's bias and failure to comport with due process. In the alternative, the defense requests a hearing to inquire into jury allegations.

Background

After his indictment for conspiracy to import heroin into the United States from Thailand in violation of 21 U.S.C. Sections 952(a) and 963, the defendant was found guilty after a jury trial on May 12, 1995.

Although no timely post-trial motions were filed, the present motion to vacate the conviction is based on two letters addressed to defense counsel and received months after the guilty verdict; specifically, the letter of juror Rose Hlavaty dated August 16, 1995, and the letter of juror Shirley Rodenbach dated September 4, 1995.

Each of the letters address three categories of complaints; intra-jury

comments prior to the start of the trial, perhaps a repeat of a jury statement prior to deliberations and juror statements or opinions during deliberations.[1]

With respect to the first two categories we refer to the pertinent portions of each juror's letter.

(a) Juror Rose Hlavaty

> I know of one juror in particular (Mary Nodel), that commented on the very first day when we were selected, that Thongchai was guilty before we even heard any testimony - she kept questioning different people about their opinions.

(b) Juror Shirley Rodenbach

> After the jurors were selected and seated, Tim Mosher who sat in seat number two next to me leaned over and whispered to me "that f__kers's guilty." (This was before the trial started). I was shocked beyond words and just gave him a horrible look. Mary Nodel, the other juror, sat in the second row. On the first day (before any testi-

---

[1] Since the latter category in no way implicated extra-jury or extraneous prejudicial information, we will not repeat for our purposes what was allegedly discussed during deliberations because we are precluded from such considerations by Fed.R.Evid. 606(b). See Tanner v. United States, 483 U.S. 107, 116-117 (1987); United States v. Di Salvo, 34 F.3d 1204, 1224-25 (3d Cir. 1994); Government of Virgin Islands v. Nicholas, 759 F.2d 1073, 1077-78 (3d Cir. 1985).

mony) she said "If you all agree with me we will not have to go through this." This was repeated in my presence time after time. Mary's other statement was "He's guilty so we might as well hang him." Several of us told her to please be quiet and not to discuss anything.

Discussions and Conclusions

During jury selection the court conducted the initial voir dire. At the outset, the jury was told that the defendant was a foreign national, but that such persons had the same rights available to them as that of an American citizen. None of the jurors indicated that they were against extending such rights to foreign nationals. The panel was asked if any would have any prejudice against an individual from Thailand. At a later point, defense counsel inquired if there would be any stereotyping the defendant because drugs came from Thailand. The jurors responded in the negative.

In the selection process, the court defined the criminal process to include the presumption of innocence and the burden of proof which is placed on the prosecution. To reiterate, the court characterized the presumption of innocence by noting that an accused is cloaked with a sacred robe of innocence of which he must be stripped by the government whether he be a citizen or a foreign national.

Immediately following jury selection and before the jury was sworn, the jurors were excused over the noon hour. However, before excusing the panel, the court carefully instructed that jurors

must avoid discussing any matter between themselves; That they must avoid discussing the case with anyone else or allowing anyone else to discuss the case with them in person or in their presence; that if approached in violation of the instruction, they should speak out and report the incident to the judge. Finally, that they were to keep an open mind.

The trial began in the afternoon on May 2, 1995. At the end of the day the jurors were again cautioned about their conduct overnight, about keeping an open mind, and about not discussing the case with others. Thereafter, similar instructions were given in the form of a reminder or actual repetition on May 3, 4, 5, 8 and 10, 1995. After closing arguments and the jury instructions on May 11, 1995, the jury commenced deliberations. We note that in its charge the court made it clear that the verdict could only be based on the evidence heard in the case. After two initial questions, including a request to have the court redefine reasonable doubt, the jury reported that it was deadlocked. The court again instructed the jury with an approved charge in the circumstances. At one point, the jury was allowed to go home for the evening after receiving cautionary instructions. On May 12, 1995 the deliberations resumed. At 11:05 a.m. another note from the jury indicated that they were further apart than their previous report of being deadlocked. The court expressed to counsel that with the defendant's concurrence we would ordinarily discharge the jury. After conferring with the defendant, his counsel

indicated a desire that deliberations continue. Without further instructions to the jury, deliberations continued. At 1:01 p.m., they indicated that a verdict had been reached.

After the jury announced its verdict, the defense requested that the jury be polled individually. As each juror's name was called, that juror audibly announced his or her individual verdict. The guilty verdict was unanimous.

Upon discharge, the jury was told they had a right not to speak with anyone, but that counsel wished to confer with those who consented to speak with them. Such a conference was held in the jury room for a considerable amount of time. None of the jurors reported any impropriety to either counsel or the court.

I.

Before addressing the substantive aspects of the defendant's motion we shall first give our reason for concluding that a hearing would be inappropriate in these circumstances. In arriving at this decision, we are mindful of United States v. Gilsenan, 949 F.2d 90, 97-98 (3d Cir. 1991) where the court discussed the merits of a hearing, but distinguished between intra-jury and extra-jury influences during a trial and when such information is first disclosed after the discharge of the jury. The appellate court agreed that a hearing was unnecessary in every case, even where post verdict evidence of extra-record evidence was allegedly considered by the jury. It held that there are compelling reasons not to hold a hearing involving the recalling of discharged jurors:

But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference. 238 U.S. at 267-68, 35 S.Ct. at 784.

....

Jurors who complete their service should rarely, if at all, be recalled for proceedings such as those appellants propose here. It is qualitatively a different thing to conduct a voir dire during an ongoing proceeding at which the jury is part of the adjudicative process than to recall a jury months or years later for that purpose. It is useful in this regard to recall the following germane words of the Supreme Court:

There is little doubt that post verdict investigation into juror misconduct would in some instances

lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Tanner v. United States, 483 U.S. 107, 120, 107 S.Ct. 2739, 2747, 97 L.Ed.2d 90 (1987). Also see United States v. Resko, 3 F.3d 684, 695 (3d Cir. 1993).

II.

In addressing the substantive portion of the defense motion we must conclude that because of the history of instructions given to the jury before they heard any evidence, as well as throughout the trial, the intra-jury references to the defendant's guilt occurring before any evidence was presented, did not prejudice the jury. Rather, we believe the jury presumably followed the court's instructions as we repeated them above. Francis v. Franklin, 471 U.S. 307, 324, n.9 (1985); Gilsenan, supra at 96.

On another occasion the Third Circuit again distinguished between intra-jury and extra-jury influences, and held that intra-jury influences pose a less serious threat to a defendant's impartial trial than do extra-jury influences. Further, that certain extra-jury influences create a presumption of prejudice. But cases involving impermissible intra-jury contacts do not

create such a presumption. United States v. Bertoli, 40 F.3d 1384, 1394 (3d Cir. 1994).

Defendant relies on United States v. Dean, 647 F.2d 779 (8th Cir. 1981), cert. denied 456 U.S. 1006 (1982), where after a jury verdict it was learned that one of the jurors had not been impartial. The court, in the "extraordinary circumstances of this case" reinstated an order of the district court granting a new trial based on a finding that one juror had "a settled disposition ... to convict regardless of the evidence." There was evidence that the juror made numerous statements during trial which demonstrated bias.

We do not believe Dean is consistent with the reasoning in the Third Circuit. Essentially, Dean presumed prejudice. Regardless, the intra-jury remarks in our case do not demonstrate a settled bias as was evidenced by the juror's remarks during trial in Dean, that "Well, I don't know whether he is guilty or not, but he's not going to get out." It is worth noting that in Dean the court noted that its holding should not be taken as embodying an arbitrary rule.

Finally, we believe great weight should be given to the fact as well as coincidence that these two jurors waited months to write similar letters some twenty days apart. Yet, when polled after their verdict each responded "guilty." Thereafter, in meeting with counsel, and after being misinformed that the defendant would get a life sentence, no indication was ever given by anyone of any prejudicial influence.

For the foregoing reasons, the motion to vacate the conviction and to grant a new trial will be denied.

SO ORDERED.

s/
Edwin M. Kosik
United States District Judge

DATED: December 28th, 1995.